Supreme Court, U. S.
FILED
AUG 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET AL.,
Appellants,

v.

JOHN T. DUNLOP, SECRETARY OF LABOR AND
CASPAR W. WEINBERGER, SECRETARY
OF HEALTH, EDUCATION AND WELFARE,
Appellees.

On Appeal from the United States District Court for the Eastern District of Kentucky

BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

GUY FARMER
WILLIAM A. GERSHUNY
FARMER, SHIBLEY, MCGUINN & FLOOD
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Bituminous Coal Operators' Association, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
I. Question Presented	2
II. Statement of the Case	2
A. The Statutory Scheme	2
B. Administration of Benefits Program	5
C. Coal Mining Industry	7
III. Argument	11

TABLE OF CITATIONS

Regulations:

30 C.F.R. Sections 70.220, 70.250, 71.107 and 71.108 .. 9

Miscellaneous:

Bureau of Labor Statistics, Department of Labor, Wage Chronology-Bituminous Coal Mine Operators and United Mine Workers of America; October 1933-November 1974, p. 1 (Bulletin 1799) .. 8

First Annual Report of Department of Labor as to Administration of Black Lung Program, dated May 30, 1974 5

Legislative History/Federal Coal Mine Health and Safety Act, p. 339 3

Statement of Andre Maisonpierre, Vice President, American Mutual Insurance Alliance before Subcommittee on Labor Standards, House Committee on Education and Labor, presented February 25, 1975 3

U. S. Department of Interior, Bureau of Mines Mineral Yearbook (1972); monthly statistical reports, Department of Interior 9

U. S. Department of Labor, Monthly Labor Review (March, 1974) p. 28-29 ..... 5, 9

Cases:

Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330 (1935) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET AL.,
Appellants,

v.

JOHN T. DUNLOP, SECRETARY OF LABOR AND
CASPAR W. WEINBERGER, SECRETARY
OF HEALTH, EDUCATION AND WELFARE,
Appellees.

On Appeal from the United States District Court for the Eastern District of Kentucky

---

BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

The Bituminous Coal Operators' Association, Inc., respectfully files this brief *amicus curiae,* with the written consent of all parties, pursuant to Rule 42 of the Rules of the Supreme Court.

I

QUESTION PRESENTED

This brief will address only the following issue, while supporting appellants on the other issues present in the case:

Whether the black lung benefits provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, are constitutionally permissible under the Fifth Amendment, insofar as they impose upon individual coal mine operators the obligation to compensate ex-coal miners for occupational disabilities arising out of employment relationships which had terminated prior to enactment of the legislation.

II

STATEMENT OF THE CASE

BCOA adopts the statement of the case as set forth in the brief submitted by Turner Elkhorn Mining Company, *et al.*, Appellants at No. 74-1316. The following will supplement Appellants' statement and briefly restate certain facts for the convenience of the Court in its study of this brief *amicus curiae.*

A. The Statutory Scheme

Pneumoconiosis, which legislatively is defined as "a chronic dust disease of the lung arising out of employment in a coal mine",[1] was not recognized by medical authorities in this country as a disease until the mid-1950's. In commenting upon the legislation, Senator Javis reviewed the history of the disease:

> "I emphasize, Mr. President, that the entire Nation shares the responsibility for this tragic

[1] Sec. 402(b), Federal Coal Mine Health and Safety Act of 1970, as amended, 30 U.S.C. 902(b).

> situation: witness after witness who testified on this bill stressed America's complete insensitivity to the problem of black lung until very recently—it was not until the mid-1950's that black lung was recognized by responsible medical authorities as a disease. Britain, on the other hand, began to recognize the disease in 1934, and it became compensable in 1943. In the United States, until last year, only three States recognized black lung as a compensable disease; in other States the only way miners could receive compensation is if they could convince examining boards they had silicosis, which usually was not possible."[2]

It was not until 1970 that Congress first enacted mandatory standards for the measurement, control and ultimate reduction of respirable dust levels in underground coal mines. Title II of the Act was the first federal legislation to provide for periodic sampling of the mine atmosphere, Sec. 202(a), and the ultimate reduction in the average concentration of respirable dust in the mine atmosphere to which each miner in the active workings is exposed to 2.0 milligrams or less of respirable dust per cubic meter of air, Sec. 202(b)(2). This current level, which medical authorities believe should prevent new incidences of pneumoconiosis and deter further development of disease in existing cases,[3] has been achieved in virtually all coal mines, through enormous capital expenditures and heavy commitments of manpower and technology.

---

[2] Legislative History/Federal Coal Mine Health and Safety Act, p. 339.

[3] Statement of Andre Maisonpierre, Vice President, American Mutual Insurance Alliance before Subcommittee on Labor Standards, House Committee on Education and Labor, presented February 25, 1975.

Similarly, it was not until 1970 that Congress first established a program to compensate miners totally disabled by pneumoconiosis and dependents of miners whose death was due to pneumoconiosis. The program consists of two parts, Part B (Sec. 411-415) and Part C (Sec. 421-431). The former, Part B, is a federally-financed program which provides benefits on the basis of claims filed on or before December 31, 1973. The latter, Part C, creates a program under which individual coal mine operators are responsible for the payment of benefits, beginning on or after January 1, 1974, on the basis of claims filed on or after July 1, 1973.

Claimants under each program are aided in their proof by certain legislated presumptions as to existence of the disease, its causal relation to mine employment, its totally disabling effect and its causal relation to the death of miners, all designed to make it much easier for a claimant to perfect his claim:

1. If a miner with pneumoconiosis was employed for ten years in coal mines, it will be rebuttably presumed that the disease arose out of such employment. Sec. 412(a)(1).

2. If a deceased miner was employed for ten years in coal mines and died from a respirable disease, it will be rebuttably presumed that his death was caused by pneumoconiosis. Sec. 412(a)(2).

3. If a miner is or has suffered from a chronic dust disease of the lung which meets certain specified medical criteria, it will be conclusively presumed that he is totally disabled due to pneumoconiosis or that he died of it or was totally disabled by it when he died. Sec. 412(a)(3).

> 4. If a miner with a totally disabling respiratory or pulmonary impairment was employed for fifteen years in underground mines (or surface mines under similar conditions), it will be rebuttably presumed that he is totally disabled by pneumoconiosis, or that he died of it or was totally disabled by it when he died. Sec. 412(a)(4).

Part C, the operator-funded program, is not limited to miners now actively employed in mining activities who may become eligible subsequent to January 1, 1974. On the contrary, claimants may be eligible for benefits even if the claim is based on death or disability which occurred *before* enactment of the law and even if the miner had ceased to be employed in the industry prior to 1970.

B. Administration of Benefits Program

Over 280,000 Part B claims have been allowed by the Social Security Administration. Of these, 174,000 (20,000 more than the entire current work force in the coal industry) were filed by coal miners and the remainder by widows and other dependents.[4]

Over 51,000 Part C claims were filed through December 31, 1974. Of these, 45,519 were received from miners and the remainder from dependents.[5] Initial determinations have thus far been made by the Depart-

---

[4] U.S. Department of Labor, *Monthly Labor Review* (March, 1974) p. 28-29.

[5] First Annual Report of Department of Labor as to administration of Black Lung Program, dated May 30, 1974.

ment of Labor in 34.5 percent (17,688) of the filings and of those on which initial determinations were made, 21.6 percent (3,817) were tentatively approved as entitled to benefits. Of those approved involving alleged liability of coal mine operators,[6] 97 percent are being contested by the particular coal operator upon whom the Government has attempted to place the burden of the entire payments.

As of July 20, 1975, less than twelve of the contested claims have been heard and decided on their merits by an administrative law judge. Only three involved claimants who were employed at a coal mine subsequent to enactment of the law. The remainder had left the industry prior to 1970.

:Gordon Abney, Sr. (Docket No. 75-BLA-18); age 80; last employed as miner in 1957 when leg was amputated; compensation awarded June 13, 1975.

:Dominic C. Brisko (Docket No. 75-BLA-21); age 65; last employed as miner in 1954; compensation awarded April 11, 1975.

:James Fields (Docket No. 75-BLA-9); age 55; last employed underground in coal mine in 1955; employed as coal truck driver 1955-1966; compensation awarded April 9, 1975.

:Abel Hamilton (Docket No. 75-BLA-27); age 45; last employed in coal mine in 1957; other non-coal mine employment to 1971; compensation awarded July 9, 1975.

:Reed Hart (Docket No. 75-BLA-22); age 23; last employed at coal mine as surveyor in 1970; other

---

[6] Where no financially responsible employer exists, benefits are paid by the Department of Labor.

non-coal mine employment to 1973; compensation awarded May 14, 1975.

:Martin Hogarty (Docket No. 75-BLA-23); age 73; last employed at surface mine in 1952; other non-coal mine employment to 1960; compensation awarded May 16, 1975.

:Jack Hoffman (Docket No. 75-BLA-15); last employed at surface mine in 1973; compensation awarded June 3, 1975.

:Nathaniel Hunter (Docket No. 75-BLA-48); age 89; last employed in foundry on surface at coal mine in 1959; compensation awarded May 15, 1975.

:Henning Clang (Docket No. 75-BLA-47); age 63; last employed at coal mine in 1973; compensation awarded June 20, 1975.

:Boyd Shaffer (Docket No. 75-BLA-11); age 67; last employed at coal mine in 1951; other non-coal mine employment to 1973; compensation awarded 1975.

:Monroe Wallen (Docket No. 75-BLA-24); age 64; last employed at coal mine in 1953; other non-coal mine employment to 1973; compensation awarded May 26, 1975.

C. Coal Mining Industry

The Act defines "coal mine" as:

> ". . . an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or methods and the work of preparing the coal so extracted, and includes custom coal preparation facilities," Sec. 3(h); 30 U.S.C. 802(h).

The term "work of preparing the coal" is defined as:

> "... the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." Sec. 3(i); 30 U.S.C. 802(i).

Included within these broad definitions are more than 4,500 underground and surface coal mines, producing from 20 tons to 30,000 tons per day of bituminous, anthracite and lignite coal with from one to 960 employees, and coal preparation plants, many of which are located off the mine property.

Historically, several industry characteristics have resulted in a high level of mobility among coal miners. One is the nature of coal mining itself, which produces an exhaustable product. As a coal mine begins to be worked out, the miners move on to newly opened or existing mines, frequently operated by another mining company. Another characteristic which contributes to the mobility of the work force is the geographical clustering of large numbers of coal mines. Unlike industries which have great latitude in locating their manufacturing facilities, the mining industry locates where coal is found to exist in mineable quantities and quality in the coal fields in a relatively few states. Thus, a wide choice of employment at different mines and companies is available to most coal miners, within driving distance of their homes.

Employment in coal mines had declined from a high of 650,000 workers in 1923 to 120,000 in 1970, when the Act became effective.[7] Since then, the number of em-

---

[7] Bureau of Labor Statistics, Department of Labor, Wage Chronology-Bituminous Coal Mine Operators and United Mine Workers of America; October 1933—November 1974, p. 1 (Bulletin 1799).

ployees had increased to more than 150,000.[8] Thus, even without considering work force turnover, the number of former miners exceeds by a multiple of four the current work force in the coal industry. There are currently more than 83,000 of these former miners on pension under the industry pension fund.

Apart from the grossly disproportionate number of former miners, the coal mining industry has yet another unique characteristic—it has the oldest labor force of any industry with the exception of the railroad industry.[9] The coal mine labor force has a substantial percentage of miners 45 years of age or older, most of whom have long work histories in the mines.

Of the current labor force in the coal industry of more than 150,000, more than 60,000 are employed at surface mines or at surface facilities which serve underground coal mines. Surface employees are exposed to considerably lower levels of respirable coal dust and lower incidences of pneumoconiosis, a fact which is reflected in the Department of Interior's frequency of sampling requirements, 30 C.F.R. Sections 70.220, 70.250, 71.107 and 71.108.

Of the approximately 90,000 miners who are employed underground at underground mines, almost half are involved in non-production activities, such as extending haulage tracks, belts, trolley wire and water lines on haulage roads; supporting roof on haulage roads; construction of stoppings (permanent partitions); repair and maintenance of equipment; and

---

[8] U.S. Department of Interior, Bureau of Mines Mineral Yearbook (1972); monthly statistical reports, Dept. of Interior.

[9] U.S. Department of Labor, *Monthly Labor Review* (March, 1974) p. 29.

supply and haulage of equipment and material. These employees, like surface employees, are exposed to considerably lower levels of respirable coal dust than those working at the mine face extracting the coal.

The black lung benefits provisions of the Act, however, draw no distinction between surface and underground employees or production and non-production employees. Thus the Act, which defines "miner" as "any individual who is or was employed in a coal mine," Sec. 402(d), 30 U.S.C. 902(d), permits any former or present coal mine employee to assert a claim and affords him the benefit of the statutory presumptions, regardless of the levels of the respirable coal dust to which he may have been exposed.

III

ARGUMENT

The Black Lung Benefits Program Insofar as It Bases Liability of Individual Coal Mining Companies on Employment Relationships Which Terminated Before Enactment of the Law, on Employment Conditions Which No Longer Exist and on a Disease Not Then Recognized Is Constitutionally Defective

The Black Lung benefits program, as this brief *amicus curiae* will demonstrate, is a classic example of retroactive legislation which arbitrarily creates new obligations based on preenactment transactions having no current or continuing effect. As such, it is violative of the Due Process Clause of the Fifth Amendment.

The Part C program incorporates a number of important features which collectively taint its validity.

> : it renders eligible for benefits all persons (and also a range of widows or dependents of such persons) who were employed in the industry at any time in the past. In an industry currently

employing approximately 150,000 persons, there are more than half a million former employees. Seven of the 11 claims already adjudicated by the Labor Department involve claimants who left the industry in the 1950's.

: it provides benefits to individuals who are retired (and currently receiving pensions under the industry's pension program), or were discharged for cause, or quit to accept gainful employment in other industries. Cf. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935). Of the adjudicated claims, one involved a miner who was disabled in 1957 following amputation of a leg; another quit employment as a miner in 1951, but worked in other industries for another 22 years; another left the coal industry in 1953, and worked in other industries until 1973; and another quit mining in 1957, but was employed in other industries until 1971.

: it establishes presumptions in aid of proof of eligibility, without regard to whether claimant was employed on the surface or underground at a coal mine, or in a production or non-production capacity, or was exposed to harmful levels of respirable coal dust. Of the 11 adjudicated cases, four involve claimants who worked on the surface in non-coal producing capacities, which are recognized by Interior Department as involving considerably lower levels of respirable coal dust.

: it imposes liability on the coal mining company which last employed the claimant without regard to his length of service with that company as compared to other companies, or whether the last place of employment was a surface or underground mine, or whether claimant otherwise was exposed to harmful levels of respirable dust. Thus, for example, a coal mining company which employed a claimant at a surface mine in 1968 and 1969 would be liable for the total compensation claim based

on claimant's exposure to high levels of respirable coal dust for many years previously at underground mines of other companies.

: it imposes total liability on individual coal mining companies, rather than providing for compensation under a program funded by the industry. Thus, black lung claims based on past employment with a company which had been engaged in mining operations on a much larger scale necessarily would have to be financed by that Company out of current, albeit reduced, production.

: it imposes liability for compensation without having first enacted legislative measures determining levels of respirable coal dust which would not be conducive to the incidence of pneumoconiosis. Equally important, coal prices might have been adjusted in accordance with sound accounting principles to reflect the then present value of such claims had they been reasonably anticipated.

: it imposes present liability based on a respiratory condition which was not recognized as an occupational disease in this country until the mid-50's and on mine conditions which were not made the subject of health standards until 1970. It was not until 1970 that coal mining companies were required to sample and take measures to reduce respirable coal dust levels in underground coal mines.

These retroactive characteristics of the black lung program alone make it perhaps unique among workmen's compensation programs in this country and render it constitutionally defective. Additionally, the economic imbalance which it creates among competing coal producers by the discriminatory standards for imposing liability on an individual coal company is additional evidence that this aspect of the program does not pass constitutional scrutiny.

As pointed out by Appellants Turner Elkhorn, the underlying philosophy of industrial compensation is that the economic losses of the worker are a part of the cost of production and are reflected in the price of the product. But by imposing unpredictable retroactive economic burdens on the employer, the philosophy is eroded and the mine owner has no way to recoup these costs.

The black lung benefits program, insofar as it applies *prospectively* to occupational disabilities suffered by workers in the employ of a coal mining company on or after enactment of the law, incorporates more traditional workmen's compensation concepts. Employers have the opportunity to take appropriate safety measures to reduce respirable dust levels in the working place, to monitor the physical condition of his employees, to transfer those of his employees with some evidence of a respiratory disfunction to less-dusty or even dust-free occupations, and to screen out job applicants with existing respiratory or pulmonary conditions. In short, each company subject to the program is in a position prospectively only to control production costs—and thus improve his competitive position in the industry—by maintaining a safe and healthful working environment for his employees.

These economic principles are thrown into disarray, however, by several features of the law including the *retroactive* aspect of the black lung program. In this regard employers have no control over the cost of current and future production, insofar as a part of those costs are based on past transactions which have no continuing effect. Current production costs and, hence, the employer's current competitive position in the market bear no relation to the employer's current working con-

ditions or to the size of the current work force. The employer whose coal mine meets—and even exceeds—federal respirable coal dust standards and whose work force is free from evidence of pneumoconiosis (as evidenced by results of the mandatory x-rays) nevertheless is competitively disadvantaged by reason of his exposure to claims from former employees whose employment has long since been terminated. A typical example illustrates the point:

> Company A, engaged in the production of coal for 40 years, has a current work force of 500 employees and produces 1 million tons per year. More than 5,000 individuals have been employed by the Company at one time or another over the years prior to 1970. Company B, engaged in the production of coal since only 1970, also produces 1 million tons of coal per annum with a work force of 500. Company A is faced with a potential claims liability grossly disproportionate to his current work force and current ability to meet these many obligations, since the number of claimants for which he is made responsible easily could exceed the number of present employees and exceed his ability to maintain a competitive operation. Company B, unburdened by this potential liability, except with reference to his current work force, has the distinct competitive advantage.

When one considers that the Part C program is not industry-funded, but rather is funded by individual employer-operators, it becomes apparent, we submit, that this legislation, insofar as it is based on employment relationships terminated prior to enactment of the law, results in such arbitrary discrimination among competing coal mining companies otherwise similarly situated as to render it constitutionally invalid.

Finally, the various legislative assumptions which make it virtually impossible to defend against black lung claims vastly increase the financial burden and makes the uneven competitive effect more pronounced.

Respectfully submitted,

GUY FARMER
WILLIAM A. GERSHUNY
FARMER, SHIBLEY, MCGUINN & FLOOD
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Bituminous Coal Operators' Association, Inc.